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PP

v.

MAULANA HASBI

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COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
AZHAR MA'AH JCA
AZAHAR MOHAMED JCA
[CRIMINAL APPEAL NO: B-05-73-2009]

C

10 FEBRUARY 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 4,832 grams of cannabis - Accused convicted for lesser charge of possession after called to enter defence for charge of trafficking -*

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Whether trial judge erred in convicting for lesser offence - Dangerous Drugs Act 1952, ss. 2, 6 & 39A(2)

A police party led by SP5 laid an ambush at a house in Taman Meru Klang. Upon seeing a motorcycle stop in front of the house,

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SP5 and his team approached the rider, and identified themselves as policemen. The rider attempted to run away but SP5 and the others managed to restrain and arrest him. The rider ('the accused') was alone with no pillion-rider. A physical body search revealed nothing incriminating. However, a blue bag placed on top

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of the motorcycle basket was found to contain five slabs of plant material wrapped in clear transparent cellophane. All the items seized from the accused including the blue bag and the five slabs of dried plant material were handed over to the investigating officer ('SP3'). The chemist ('SP1') subsequently confirmed that

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the five slabs of dried plant material were cannabis weighing 4,832 grams. The accused was charged, originally, with the offence of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') punishable under s. 39B(2). The trial judge called the accused to enter his defence on the original charge at the close

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of the prosecution's case but subsequently convicted the accused on a lesser charge of possession under s. 6 and punishable under s. 39A(2) of the DDA. The issue that arose in this appeal was whether the trial judge had fallen into a serious misdirection of the facts and law to acquit the accused on the charge as framed by

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the prosecution.

Held (allowing the appeal; setting aside conviction and sentence under s. 6 DDA and substituting with conviction under s. 39B(1)(a) DDA)
Per KN Segara JCA delivering the judgment of the court:

(1) The trial judge was correct in concluding that the accused had not rebutted the statutory presumption of his "knowledge" of the drugs under s. 37(d) DDA on a balance of probabilities. She had also correctly applied the principle of "wilful blindness" to the contents of the blue bag and concluded that the accused had the "knowledge" of the drugs in the bag, but did not make a finding of actual *mens rea* possession. The trial judge had also correctly rejected the defence of the accused that he was an innocent carrier. (paras 22 & 23)

(2) The trial judge had fallen into serious misdirection of facts and law when, having rejected the accused's defence at the close of the defence, had gone on to acquit the accused on the charge as framed by the prosecution. It was clear from the accused's own admission that he was transporting the drug on the motorcycle for delivery to another person and was not merely conveying or carrying from one place to another. The overt act of the accused clearly fell within the definition of "trafficking" under s. 2 DDA. (paras 24 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Satu pasukan polis yang diketuai oleh SP5 telah membuat serbuan di sebuah rumah di Taman Meru Klang. Apabila melihat motosikal berhenti di hadapan rumah tersebut, SP5, bersama-sama dengan pasukannya telah menghampiri penunggang dan memperkenalkan diri mereka sebagai pihak polis. Penunggang itu cuba melarikan diri tetapi SP5 dan yang lain berjaya menghalang dan menangkapnya. Penunggang ('tertuduh') bersendirian dan tiada pembonceng motosikal dengannya. Satu penggeledahan badan perayu tidak mendedahkan apa-apa yang boleh menunjukkan beliau bersalah. Walau bagaimanapun, satu beg biru yang terletak di bahagian atas bakul motosikal didapati mengandungi lima kepingan bahan tumbuhan kering yang dibaluti selofan jelas dan telus. Semua item-item yang dirampas daripada tertuduh termasuk beg biru dan lima kepingan bahan tumbuhan kering telah diberi kepada pegawai penyiasat ('SP3'). Ahli kimia ('SP1') kemudiannya mengesahkan

bahawa lima kepingan bahan tumbuhan kering adalah kanabis yang beratnya adalah 4,832 gram. Tertuduh telah dituduh, pada asalnya, dengan kesalahan pengedaran di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s. 39B(2). Hakim perbicaraan telah memanggil tertuduh untuk memasukkan pembelaan pada pertuduhan asal pada akhir kes pendakwaan tetapi kemudiannya telah menyabitkan tertuduh dengan pertuduhan yang lebih rendah iaitu milikan di bawah s. 6 dan boleh dihukum di bawah s. 39A(2) ADB. Isu yang timbul di dalam rayuan ini adalah sama ada hakim bicara telah tersalah arah dari sisi fakta dan undang-undang apabila melepaskan tertuduh dari pertuduhan seperti yang dirangka oleh pihak pendakwaan.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman di bawah s. 6 ADB dan digantikan dengan sabitan di bawah s. 39B(1)(a) ADB)

Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara betul apabila membuat kesimpulan bahawa tertuduh gagal menyangkal anggapan statutori 'pengetahuan' tertuduh mengenai dadah-dadah di bawah s. 37(d) ADB pada imbangan kebarangkalian. Hakim bicara juga telah dengan betul menggunapakai prinsip "wilful blindness" kepada kandungan dalam beg biru itu dan memutuskan bahawa tertuduh mempunyai 'pengetahuan' mengenai dadah-dadah di dalam bag itu, tetapi tidak membuat dapatan wujudnya *mens rea* milikan sebenar. Hakim bicara juga telah dengan betul menolak pembelaan tertuduh bahawa tertuduh adalah pembawa yang tidak bersalah.

(2) Hakim bicara telah tersalah arah dari sisi fakta dan undang-undang apabila, selepas menolak pembelaan tertuduh pada akhir kes pendakwaan, telah melepaskan tertuduh dari pertuduhan yang dirangka oleh pihak pendakwaan. Ia adalah jelas daripada pengakuan tertuduh sendiri bahawa tertuduh sedang mengangkut dadah yang terdapat di motosikal untuk penghantaran kepada orang lain dan bukan semata-mata menyampaikan atau membawanya dari satu tempat ke tempat yang lain. Perbuatan terbuka tertuduh dengan jelasnya terjatuh ke dalam takrif 'pengedaran' di bawah s. 2 ADB.

Case(s) referred to: A
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39B(1)(a), (2), 39A(2)

For the appellant - Siti Rafidah Zainuddin; DPP B
For the respondent - Rusli Zain; M/s Rusli Zain & Assocs

[Editor's note: For the High Court judgment, please see PP v. Mohamad Maulana Hasbi [2009] 1 LNS 380]

Reported by Shankar Krishna C

JUDGMENT

KN Segara JCA: D

[1] The respondent (accused) was originally charged for the offence of trafficking in 4,832 grams of cannabis an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (DDA) and punishable under s. 39B(2) with a mandatory death sentence. E

[2] However, the trial judge, having called the accused to enter his defence on the original charge at the close of the prosecution's case, convicted the accused on a lesser charge of possession under s. 6 punishable under s. 39A(2) DDA, at the end of the defence case, notwithstanding that upon a careful and meticulous analysis F of the evidence before her, she had rejected the defence of an innocent carrier. She seriously misdirected herself on the law and facts when she held at the close of the case for the defence that the prosecution had relied on the statutory presumption under s. 37(d) DDA to establish knowledge of the drugs and as a G consequence would be offending the rule against double presumption to prove its case of trafficking by invoking the aid of s. 37(da) DDA. She also held at the close of the defence case there was no evidence of actual trafficking.

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[3] We are of the view that the trial judge failed to appreciate that in law it is open to the prosecution to rely on the presumption of trafficking under s. 37(da) DDA to support a charge under s. 39B DDA without relying on the presumption under s. 37(d) when there is *mens rea* possession by the accused I

on the factual matrix of the case. Conversely, the prosecution may rely on the presumption under s. 37(d) to prove possession and seek to prove by affirmative evidence independent of presumption under s. 37(da) that the accused was in fact trafficking in the said drug.

[4] We are of the view the trial judge was quite clear in her mind at the close of the prosecution's case that the prosecution had established a *prima facie* case on the original charge and had accordingly called upon the accused to enter his defence. If the accused had elected to remain silent and offered no evidence, the trial judge inevitably would have convicted the accused on the original charge!

[5] The trial judge did not err at all when she called for the defence on the original charge. She stated in her grounds:

> ... I have considered the issues sought to be put to SP5 and SP6 in relation to the issue of possession, namely that the accused was not on the motorcycle but seated on a blue sofa within the gates and confines of house No. 25. At this stage, having considered the evidence of SP3 and SP4 in toto, I find them to be credible witnesses. There appears to be no basis at this stage warranting a finding that they fabricated the entire evidence about the accused being on the motorcycle carrying on its basket the blue "Garfield" bag with the drugs. The suggestions put forward by defence counsel did not have the effect of adversely affecting the credibility of SP5 and SP6. In short, the totality of the evidence leads to the conclusion that the accused had custody and control of the blue "Garfield" bag and thereby the five slabs of dried plant material.
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> Having established that custody and control of the blue Garfield bag is with the accused, how does that relate to "possession" of the subject drugs? By virtue of s. 37(d) of the Act, it follows that as the accused was found to have had in his custody or under his control, the red and white plastic package containing 4832 grams of cannabis, he is deemed to have known the nature of such drug until the contrary is proved. With the aid of the statutory presumption in s. 37(d) of the Act, knowledge is inferred, thereby fulfilling the necessary ingredients to show "possession". It can therefore be concluded that for purposes of establishing a *prima facie* case, the prosecution has succeeded in showing that the 1st accused had possession of the subject cannabis.

Ingredient (ii): That the accused was 'trafficking' in 4832 grams of cannabis

The prosecution sought to establish this ingredient of the charge by relying on s. 2 of the Act which includes in its definition of "trafficking", the act of "transporting" dangerous drugs. It was submitted that as the accused was riding a motorcycle containing the blue 'Garfield' bag containing the subject drugs, he was in effect "transporting" the cannabis. Moreover the fact that the quantity of cannabis was far in excess of an amount that would be utilized for personal consumption was in itself sufficient to warrant an inference of "trafficking" as set out in, *inter alia*, *Ong Ah Chuan v. PP* by Lord Diplock:

... Proof of the purpose for which an act is done, ... Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him be irresistible ... even if there were no statutory presumptions such as contained in section 15 of the Drugs Act"

At this, the *prima facie* stage of the case, I adopted and agreed with the submissions put forward by the prosecution in view of the weight of the drugs involved which did not appear to be of a quantity that the accused would be carrying for his personal use. In the circumstances, I called upon the accused to enter his defence to the charge as framed.

[6] Briefly the facts are as follows.

[7] On 11 February 2004 at about 5pm C/I Mohd Husni bin Manaf (SP5) led a party of 12 police personnel in four vehicles to a house in Taman Meru Klang. The team was led to the front of house No 25 Jalan Solok 5A and the party took up various positions within the vicinity of the house. About 45 minutes thereafter SP5 saw motorcycle No WDX 1858 ridden by a male Malay stop in front of the house. SP5 and his team were about 25 meters from where the motorcycle had stopped.

[8] SP5 testified that he saw a blue bag lying on top of the basket (carrier) of the motorcycle attached to the front portion of the motorcycle immediately in front of the rider of the motorcycle.

[9] SP5, Detective Abu Hassan, Detective Pang and Detective Palai approached the rider and identified themselves as policemen. The rider had taken off his helmet and the engine of the motorcycle had been put off. The rider was shocked and attempted to run away but SP5 and Detective Palani managed to restrain him and arrested him. The rider was the accused. There was no pillion-rider. The accused was alone.

[10] A physical body search carried out by SP5 revealed nothing incriminating. SP5 examined the blue bag placed on top of the motorcycle basket. It carried the brand name 'Garfield'. The zip of the bag was fastened. SP5 unfastened the zip. Inside the bag he found five slabs of plant material wrapped in clear transparent cellophane which SP5 suspected to be cannabis. The slabs were clearly visible through the cellophane.

[11] The accused and all the items seized from the accused including the blue bag and the five slabs of dried plant material were handed over to the investigating officer (SP3) at the police headquarters Klang.

[12] The Chemist (SP1) confirmed that that upon analysis, the five slabs of dried plant material was cannabis weighing 4832 grams.

[13] The defence of the accused in a nutshell was that he was an innocent carrier of the drug and that he had no knowledge that the blue 'Garfield' bag contained any drug.

[14] Briefly, the evidence of the accused in his defence on oath was as follows. He did not call any witnesses to testify.

[15] The accused testified that he arrived in Malaysia illegally on 2 January 2004 from Aceh to earn a better living. He had procured employment as a lorry driver through his friend 'Bob'. He rented a room in Meru. He was paid RM4.50 an hour with a day off on Sundays. He was employed for 20 days before his arrest.

[16] Just two days before his arrest the lorry he was assigned to drive broke down. Each day he took a taxi to work and sat waiting for his employer at a canteen over this period. He earned no money during those two days. He owed money to the canteen for the food he had consumed over the two days.

[17] On 11 February 2004, he testified he met Bob at the canteen who offered him the loan of a motorcycle to use to and from his lodgings in Meru. This was about 4pm on 11 February 2004. The accused accepted the offer but informed him that he had no money. Bob gave him RM10 for petrol and food. The accused expended RM6 on petrol and kept RM4 for his dinner that night. After filling the motorcycle with petrol and putting on his helmet the accused got ready to return to his lodgings in Meru for the night. However, Bob told him to wait for a short while.

[18] Bob requested the accused to carry a bag to one Ah Meng's house. The accused knew Ah Meng who sold durians outside his rented lodgings. Bob wanted the bag delivered to Ah Meng. Another driver called Thauli loaded a blue 'Garfield' bag on to the basket at the front of the motorcycle. The accused did not ask what was in bag. It was zipped close.

[19] The accused duly complied with the request of Bob and rode the motorcycle to Meru. The journey took about five minutes. He did not open the bag or ascertain the contents of the bag. He could feel the bag against the front portion of his body and it felt soft. On reaching house No 25 Jalan Solok Mahang the gate to the house was open. He parked the motorcycle in front of the house within the confines of the gate. He then knocked on the front door of the house and called out for 'Ah Meng' thrice. There was no response. So he sat on a blue sofa located in front of the house and attempted to call Bob on his handphone but received no reply. About a minute later an Indian man approached the house, parked his vehicle, and entered with a pistol and instructed the accused not to run away.

[20] The Indian man then handcuffed his hands at the back. Two other persons appeared from within the house and took him into the house. The accused said that these men who were policemen used a yellow hose to hit his feet and head. There were many persons in the house.

[21] The police then brought the blue 'Garfield' bag and opened it. A red towel was immediately visible. The police used the red towel to tie his mouth and he was drenched with water. His mouth was tied because he was crying out in pain. The policemen kept asking him whose cannabis it was. The accused maintained that he was astounded and shocked to note the contents of the bag.

[22] The trial judge after carefully analyzing the accused's evidence correctly concluded that the veracity of the existence of 'Bob', 'Thauli' (Thamby) and 'Ah Meng' was seriously in doubt as the accused was not able to provide details of these characters prior to the trial or at the trial to the police, which details ought to have been in the knowledge of the accused. She accordingly rejected the accused's version of events in his defence. She correctly concluded that the accused had not rebutted the statutory presumption of his "knowledge" of the drugs under s. 37(d) on a balance of probabilities. She had further correctly applied the principle of 'willful blindness' to the contents of the blue bag and concluded that the accused had "knowledge" of the drugs in the bag at all material times but did not make a finding of actual *mens rea* possession, although we are of the view she would have been fully justified to do so from facts and inferences revealed by the accused's defence and conduct in regard to the blue bag.

[23] The trial judge correctly rejected the accused's testimony that he was simply an innocent carrier who had been tasked by someone to whom he was beholden to transport and pass over a bag the contents of which were unknown to him to a third party. She clearly expressed her rejection of the accused's defence in her grounds of judgment as follows:

> In the instant case too, the statutory presumption under section 37(d) was invoked upon proof of the accused having custody and control of the subject drugs contained in the blue 'Garfield' bag. This follows from the fact that he had custody and control of the blue 'Garfield' bag as it was placed and carried by the accused on top of the basket of the motorcycle he was riding. (see *PP v. Letchuman Suppiah* [2006] 1 CLJ 557). In so far as the defence is concerned, it is incumbent upon this Court to ascertain whether, on a balance of probabilities, the accused has rebutted that revocable presumption. This requires a consideration of the totality of the evidence. Here the accused was not an innocent carrier of the subject drugs in the sense that the drugs were not planted in luggage he was carrying without his knowledge. Instead, he was asked to carry the subject drugs contained in the blue 'Garfield' bag. His failure to inspect the bag, in the context of the factual matrix he testified to, does not rebut the presumption but in fact appears more like willful blindness, if in fact his version of events is true (which I have rejected above)

> Therefore even if I was incorrect in rejecting his version of events in relation to the existence of 'Bob', Thambi and 'Ah Meng', his failure or refusal to inspect the contents of the bag containing the subject drugs, amounts on the facts of this case, to the sort of 'willful blindness' that is explained by CJ Yong Pong How above.
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> For the reasons above, defence of the accused is rejected.

[24] We are unanimous that the trial judge having carefully considered the accused's defence and rejected it at the close of the defence had fallen into a serious misdirection of the facts and law to acquit the accused on the charge as framed by the prosecution. Her justification to reduce the charge on the grounds she stated, *inter alia*:

> Apart from the fact that the accused was standing by his motorcycle at the time of the police raid, there is no other evidence or surrounding factual matrix from which this Court may conclude that the accused was trafficking in the subject drugs.

flies in the face of her own findings at the close of the prosecution's case as well as her finding to reject the accused's defence of an innocent carrier at the conclusion of the accused's testimony and defence!

[25] On the totality of the evidence, the trial judge had misdirected herself that to arrive at the conclusion of trafficking the court would be relying on two inferences or presumptions which is prohibited (*Muhammed Hassan v. PP* [1998] 2 CLJ 170).

[26] We are unanimous that she was clearly wrong in law on her further justification:

> In the absence of direct evidence of trafficking, as is the case here, what is left is the evidence of the accused being in possession of the subject drugs with the aid of the use of section 37(d) of the Act.

[27] It was clear from the accused's own admission in his defence that he was transporting the drug on the motorcycle (from his place of work) for delivery to Ah Meng. His purpose was to part with possession of the drug in the blue bag. He was clearly not merely conveying or carrying from one place to another but doing so to promote the distribution of the drug to another (Ah Meng) be it at the behest of Bob or otherwise. The accused's overt act clearly falls within the definition of "trafficking" under s. 2 DDA.

A **[28]** Appeal allowed. Conviction and sentence of the Judicial Commissioner for an offence of 'possession' under s. 6(2) and punishable under s. 39A(2) is set aside and substituted with a conviction on the original charge for an offence under s. 39B(1)(a) Dangerous Drugs Act 1952. The accused is sentenced to death
B by hanging.

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